SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 902

SHERMAN T. IRWIN,
Petitioner

v.

THE STATE OF TEXAS,
Respondent

On Petition for Writ of Certiorari to
The Court of Criminal Appeals of Texas

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas has not yet been reported. A copy of the opinion is attached as an Appendix to the Petition for Writ of Certiorari at page 23 to page 32.

JURISDICTION

The jurisdictional requisites would appear to be adequately set forth in the Petition, although Respondent disputes Petitioner's contention that any rights guaranteed by the United States Constitution have been denied.

QUESTIONS PRESENTED

Petitioner presents two questions which he asserts should be reviewed by this Court. These questions may be restated and summarized as follows:

1. Does the affidavit, executed in support of the search warrant, on its face, show sufficient facts to establish probable cause for the issuance of the search warrant?

2. Is it constitutionally permissible to use the fact that Petitioner has purchased a Federal Wagering Occupational Stamp as an element of probable cause in a search warrant affidavit?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The due process clause of the Fourteenth Amendment, the Fourth Amendment and the Fifth Amendment of the Constitution of the United States are involved herein, as well as Vernon's Texas Penal Code, Article 642(c), Section 1. The Petition at page 4 and 5 sets out these pronouncements.

STATEMENT OF THE CASE

Petitioner was convicted in the District Court of Polk County for unlawfully keeping for the purpose of gaming, a policy game; his punishment was assessed at two years in the penitentiary.

The testimony of the State reveals that Texas Rangers Rundell and Rogers together with other officers, armed with a search warrant, found the Petitioner at home when they went to his residence which was located in a rural area in Polk County, on Sunday, February 7, 1965, shortly after Russell Barnes, bookkeeper for T & L Policy Company had arrived. The T & L Policy Company was owned and operated by the Petitioner. In Petitioner's house the officers found a tan suitcase, bundles of tear-out sheets containing plays

for several previous days, over $13,000 in money, hit-slips, "squirrel cage," and other items of policy paraphernalia. A large number of the hit-slips had been used on at least eight different days before February 7, 1965. The evidence showed that these articles were adaptable to and could be or had been used in the operation of a policy game.

ARGUMENT AND AUTHORITIES

I.

THE AFFIDAVIT SUPPORTING THE SEARCH WARRANT STATED SUFFICIENT FACTS TO SATISFY THE PROBABLE CAUSE REQUIREMENT OF THIS COURT.

The affidavit is set out in its entirety in the Petition at pages 40-42.

In *Aguillar v. Texas,* 378 U.S. 104, 84 S.Ct. 1509, a search warrant had issued upon an affidavit of a police officer who swore only that they had "received reliable information from a credible person and do believe" that narcotics were being illegally stored on the described premises. This Court held the affidavit inadequate for two reasons. First, the application failed to set forth any of the "underlying circumstances" necessary to enable the magistrate independently to judge the validity of the informant's conclusion that the narcotics were where he said they were. Second, the affiant officers did not attempt to support their claim that their informant was "credible" or his information "reliable." The facts set forth in this affidavit are sufficient to establish the "probable cause" re-

quired by the Texas statute and the due process requirements of the Fourth and Fourteenth Amendments of the United States Constitution.

Although the affidavit reflects that some of the information contained therein was based in part on hearsay information, such information may properly form the basis for a valid search warrant under the holding of *Jones v. United States,* 362 U.S. 257 (1960). Moreover, here a part of the information forming the foundation upon which the magistrate rested his decision—that there was probable cause to believe that implements, devices, equipment and paraphernalia were kept for the purpose of carrying on a gaming policy game on the premises described—was the direct, personal observation and knowledge of the affiant who had conducted an intermittent surveillance for a period of three or four weeks of the house concerned, and observed two persons known to the affiant to be involved in the carrying on and keeping and exhibiting of policy games, coming upon and leaving the above described premises.

The unnamed informants whose reliability was known, told the affiants that Petitioner had admitted that he had on the premises in question a duplicating machine and equipment on which he was currently producing and printing policy slips for the use and purpose of gaming and carrying on a policy game.

The unnamed informants told the affiants that Petitioner had in his employment more than a dozen persons engaged in the carrying on of policy games. While the facts and circumstances which would show how this information was obtained were not set out, the

officers acted on the information (believing from past experience that it was reliable) and obtained confirmation of the information by personal observation.

The assertion by affiants that Petitioner had purchased a Federal Wagering Occupation Stamp was evidence of a persuasive character that could not be ignored. For the affiants to ignore such information would have been a manifest dereliction of duty. All of these related facts were presented to a neutral and detached magistrate who then properly concluded that there was probable cause to believe that implements, devices, equipment and paraphernalia were kept in the premises in question for the purpose of gaming a policy game. *United States v. Ventresca,* 380 U.S. 102 (1965).

Respondent submits that there was substantial basis for the magistrate to conclude that gambling paraphernalia were probably present.

It is only necessary to show the probability, and not a prima facie showing, of criminal activity as the standard of probable cause. *Becker v. Ohio,* 379 U.S. 89, 96 (1964). The affidavits of probable cause should be tested by much less rigorous standards than those governing the admissibility of evidence at trial (*McCray v. Illinois,* 386 U.S. 300 (1967)), or the exactness required of an indictment.

This court, in *United States v. Ventresca,* 380 U.S. 102, 108 (1964) stated:

> "If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by

magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial offer before acting."

Petitioner attacks the honesty of the affidavit because of Officer Rundell's testimony that he thought some policy paraphernalia would arrive that afternoon, and therefore did not execute the warrant until later in the day. Why should this testimony lead to the conclusion that Officer Rundell's affidavit was made in bad faith? The officer testified that when he swore to that affidavit, he honestly believed that paraphernalia was present at that time (S.F. 26), and the evidence indicates that he was correct. That he expected additional paraphernalia to arrive later that afternoon in no way affects the honesty of the affidavit sworn to that morning. Petitioner's argument cannot be supported by the facts of this case.

II.

IT IS CONSTITUTIONALLY PERMISSIBLE TO USE THE FACT THAT PETITIONER HAS PURCHASED A FEDERAL WAGERING OCCUPATIONAL STAMP (26 U.S.C.A. (I.R.S. 1954) §§ 4401, 4411, 4412.) AS AN ELEMENT OF PROBABLE CAUSE IN THE SEARCH WARRANT AFFIDAVIT.

Petitioner was not charged with having failed to

purchase a Federal Wagering Occupation Stamp. No evidence was offered, in the state trial, which in any way tended to show that Petitioner had purchased a Federal Wagering Occupation Stamp. Unlike *Marchetti v. United States,* 390 U.S. 39, 88 S.Ct. 697 (1968) and *Grosso v. United States,* 390 U.S. 62, 88 S.Ct. 709 (1968) no substantial right guaranteed by the Fifth Amendment is involved in this case. In *Marchetti* and *Grosso* as well as in *United States v. Lookreits,* 398 F.2d 64 (7th Cir., 1968) and *Butler v. United States,* 361 F.2d 220 (5th Cir., 1966) the defendants were convicted because they had not purchased a Federal Wagering Occupation Stamp. Here, the magistrate who issued the search warrant and only the magistrate was made aware of the purchase by Petitioner of a Federal Wagering Occupation Stamp. Such evidence was never presented to the jury, nor may it be found anywhere in the record of this case other than in the affidavit examined by the magistrate.

That the Court did not intend to bar the collateral use of information that an individual had purchased a Federal Wagering Occupation Stamp is evident from the stated holding of the Court in *Marchetti* at page 61:

> "We hold *only* that those who properly assert the constitutional privilege as to these provisions may not be criminally punished for failure to comply with their requirements."

Neither this Court nor any other court has applied the doctrine of *Marchetti* and *Grosso* in a collateral proceeding, and had this Court intended that it be so applied it would not have restricted its holding in *Marchetti.*

In *Gillespie v. United States,* 368 F.2d 1 (8th Cir.,

1966) the affiant testified that, beyond the recital of the affidavit, he had orally told the magistrate "that we had checked with Internal Revenue, and that Joe Gillespie had a current wagering stamp; . . ."

The Court found no difficulty in accepting the fact of Gillespie's possession of a wagering stamp as a circumstance to consider as a ground for a finding of probable cause.

While the court found there were not sufficient allegations upon which probable cause could be based in *Gillespie,* the importance of the decision rests in the court's determination that the possession of a wagering stamp was a demonstrable factor to be considered in measuring probable cause for the search warrant.

CONCLUSION

For the reasons above stated, Respondent says that there is no violation of due process presented. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gilbert J. Pena, Assistant Attorney General of Texas, certify that a copy of the foregoing Brief for Respondent in Opposition was served on the attorney for Petitioner, by depositing same in the United States Mail, postage prepaid, certified mail, addressed to Mr. James Edwin Smith, 1401 South Coast Building, Houston, Texas 77002, on this the ____ day of March, 1969.

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